No. 230.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ALBION LUMBER COMPANY,
Plaintiff in Error,

v.

MARIA DE NOBRA, ADMINISTRATRIX, ETC.,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF CASE.

The plaintiff in error was the defendant in the court below, and in this brief will be referred to as the defendant, Maria De Nobra, administratrix of the estate of Jose De Nobra, the defendant in error, was the plaintiff in the court below, and in this brief will be referred to as the plaintiff.

The defendant below (plaintiff in error) is a lumber company, having its mill and logging-camp in the red-

woods of Mendocino County. For the purpose of transporting its logs from the forest to its mill it has constructed and operates a "logging railroad." This road is constructed entirely on its own lands, and is used simply for its own business. It is not, and does not, purport to be a common carrier of freight or passengers.

The husband of plaintiff below, on the 13th of June, 1893, applied with three or four others, to the superintendent of the logging-camp and logging railroad for work. The plaintiff below contended that the superintendent asked them if they had blankets, and on being told that the plaintiff's husband, and one or two others, had blankets at a neighboring town, he told them to get on the railroad and ride down to the boom, and go and get their blankets, and he would give them work.

This is denied on the part of the defendant below. It is undisputed, however, that several hours afterwards, the plaintiff's intestate, (her husband,) with one other applicant for work, did, when a train-load of logs stopped at a water-tank, climb up on top of a carload of logs in order to ride from the forest down toward the boom. There were no accommodations whatever for a passenger. The position on top of a carload of logs is a dangerous one, for the reason that it is impossible to fasten the logs so as to prevent all chance of their getting loose and rolling. The logging-train was a long one, consisting of a locomotive and thirteen (13) cars loaded with logs. Plaintiff's intestate

climbed on the fourth car from the engine. He was not seen until after the train pulled out from the water-tank. A few minutes afterwards, and on the way down to the boom, in running down a steep grade, the hind part of the car on which the plaintiff's intestate was riding, was derailed, the couplings of the car separated, and the plaintiff's intestate, with his companion and an employee of the railroad, fell in between the rolling logs and were killed.

On the trial of the case below, the plaintiff offered no evidence as to what caused the accident, beyond attempting to prove that the train was running at the rate of thirty (30) miles an hour.

The defendant proved the track was in good condition, well ballasted, with steel rails, and offered much testimony to show that the train was running at a very slow rate.

After the plaintiff had closed her case, and on the cross-examination of one of the witnesses for defendant below, the fact was brought out that a bull came up from under a bridge, and, as the engine and some of the cars passed, was standing in a narrow space between the track and a high bank, and that the bull probably attempted to turn round. At any rate, he came in collision with a car, and was run over and killed, and that this caused the accident.

After the accident, the plaintiff below was appointed administratrix of her husband's estate, and brought this action to recover damages on account of his death.

On the trial, the defendant below insisted that the

court should instruct the jury to find in favor of the defendant. This the court refused to do, to which the defendant duly excepted. The court thereupon submitted the case to the jury under the instructions set out in the Transcript. The defendant excepted to certain portions thereof, and the jury brought in a verdict in favor of the plaintiff, and assessed the damages at *two thousand dollars* ($2000). The defendant below moved for a new trial, in accordance with the California practice. Its motion was denied, and it sued out a writ of error to this Court.

Another case brought by the administrator of the other party killed at the accident is pending, and is to be determined by this case.

The questions involved are:

First. Whether the court below erred in refusing to direct a verdict in favor of the defendant; and

Second. Whether the instructions given by the court to the jury were correct.

Third. Whether the court was justified in refusing to give the instructions asked for by the defendant.

SPECIFICATION OF ERRORS RELIED UPON.

First. The court erred in refusing to instruct the jury to find a verdict in favor of the defendant. (Pages 65, 85.)

Second. The court erred in giving the following charge to the jury:

"The defendant is a logging company, and not a "common carrier of passengers, and hence it has not "the responsibility of such, but it was not without duty "to De Nobra. If, therefore, you find from the evidence "that Hickey, the Superintendent of the road, had the "right to employ men for the company, and was in the "control and management of the defendant's business, "including the railroad, and had the apparent author- "ity to permit persons to ride on the cars, and did per- "mit De Nobra to ride; or if you find from the evi- "dence that there was a custom to allow persons to "ride which was acquiesced in by the company, and "the conductor permitted De Nobra to ride, he was "lawfully, in either of these instances, upon the train; "but as I have said before, he was not a passenger as "the word is understood in regard to railroads. The "distinction is important, because, if he had been a "passenger the company would have owed him the ut- "most care and caution, and the injury being proven, "it would devolve upon the defendant to show that it "could not have been avoided; but under the circum- "stances of the present case it is only responsible for "gross negligence—that is, the defendant is only re- "sponsible for gross negligence."

Third. The court erred in giving that portion of its charge to the jury which is in the following language, to wit:

"If you find from the evidence that the train was "run at 30 miles an hour, and you also find it was "gross carelessness to do so—that is, to so run it—you

" will find on this issue for the plaintiff. If you find it " was not so run, but on the contrary, it was run from " 7 to 10 miles an hour, and that this was not gross " negligence, you will find on that issue for the defend- " ant. I have instanced these two rates of speed of 30 " miles an hour and from 7 to 10 miles an hour, but if " the evidence satisfies you that the train was run at a " different rate from either 30 miles an hour or from 7 " to 10 miles an hour, then you will have to address " yourself to the inquiry as to whether or not such rate " was or was not gross negligence. If you find it was " gross negligence, you will find for the plaintiff, and if " you find it was not, you will find for the defendant."

Fourth. The court erred in giving that portion of its charge to the jury which is in the following language, to wit:

" The defendant contends that De Nobra was guilty " of negligence in getting on the logs. The burden of " proof was on it to establish that this was negligence, " and it must be shown by the defendant by a prepon- " derance of evidence, unless the testimony of the " plaintiff shows it. If, therefore, you find from the " evidence that De Nobra was guilty of negligence in " riding upon the logs, and that riding directly contri- " buted to the injury, you will find for the defendant, " unless you also find that the defendant might have by " the exercise of reasonable care and prudence avoided " the consequence of such negligence."

Fifth. The court erred in refusing to give the fol-

lowing charge and instruction to the jury, requested by the defendant, to wit:

" Before you can find in favor of the plaintiff in this " action, you must be convinced by preponderance of " evidence of the following facts:

" 1st. That the defendant owed a duty to plain- " tiff's intestate.

" 2nd. That the plaintiff's intestate was not himself " guilty of negligence in taking a position upon the top " of a loaded car in a logging train.

" 3rd. That it was on account of the negligence of " the defendant's employees that the accident occurred.

" Unless you find in favor of the plaintiff on all three " of these propositions, your verdict must be for the " defendant."

" In regard to the first proposition, namely: that the " defendant must owe a duty to the plaintiff's intestate, " I charge you as follows, namely: that the fact that " other parties were permitted by the defendant to ride " upon the cars, did not give the plaintiff's intestate " any right to take passage on those cars. Likewise, if " you believe the statement of the defendant's witness, " Hickey, that he did not invite or authorize the plain- " tiff's intestate to ride upon the cars, then the plain- " tiff's intestate was a trespasser, and the defendant " owed the plaintiff's intestate no duty."

"In this connection I also charge you as matter of " law that Mr. Hickey, the Superintendent of the de- " fendant's railroad, had no ostensible authority to in-

" vite the plaintiff's intestate to ride upon the defend-
" ant's cars. The defendant's cars were used for the
" purpose of transporting logs and lumber, and were
" not intended for the purpose of carrying passengers,
" and Mr. Hickey, under the evidence, had no authority
" to invite or authorize persons to ride on the defend-
" ant's cars.

" In regard to the second proposition, namely, as to
" whether the plaintiff's intestate was himself guilty
" of contributory negligence, I charge you, that if it
" was not safe to ride upon a train of cars loaded with
" logs, or if it was not safe to ride upon the top of a
" carload of logs, then the plaintiff is guilty of contri-
" butory negligence, and is not entitled to recover.

" In considering the question as to whether or not
" it is safe for a party to ride upon such a train as the
" plaintiff's intestate rode upon at the time of the acci-
" dent, you may take into consideration the usual and
" ordinary incidents natural to the running of such a
" train, and as to whether accidents are liable to happen
" under the best of management in operating such a
" train.

"A party has no right to put himself in a dangerous
" position and thereby increase the ordinary risk at-
" tending transportation upon railroads. You may also
" take into consideration the fact that this train was
" not intended for the carrying of passengers, and there-
" fore that the defendant was under no obligation to
" make it safe for persons riding upon it. In this con-
" nection I charge you as follows:

"If a person takes an exposed position upon a train "not designed for the use of passengers, he himself in- "curs the special risks of that position, whether he "takes it by license, non-interference, or even express "permission of the conductor.

"The defendant's logging train was obviously not "intended for passengers. There was no vehicle at- "tached to it in any way adapted for passengers.

"If you believe that the plaintiff's intestate at the "time of the accident was riding for his own con- "venience in a place where it was not safe or prudent "to ride, he took upon himself the risk of so doing, "whether he did so on the license of invitation of Mr. "Hickey or not. It is not within the apparent scope "of Mr. Hickey's authority to permit persons to ride "on his logging train, nor can the fact that he allowed "plaintiff's intestate to do so make the defendant re- "sponsible.

"In regard to the third proposition, it is necessary "for the plaintiff to prove to your satisfaction that the "accident was caused by the negligent conduct of the "defendant's servants. If you believe from the evi- "dence that the defendant did not run its railroad at "an excessive rate of speed, and that the accident was "such a one as might ordinarily happen in the manage- "ment of such a business, without fault on the part of "the defendant's employees, then you must find for the "defendant. To prove such fault on the part of the "defendant's employees is upon the plaintiff."

Sixth. The court also erred in refusing to give the separate portions of said above charge requested by the defendant as set out in the Specification of Errors in the Transcript, pages 90–91–92–93.

Seventh. The court erred in denying the defendant's motion for a new trial.

ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR.

It is necessary, in order to understand the case fully, to call attention to those allegations of the complaint setting out the facts which (it is claimed) made the Lumber Company liable for the unfortunate death of plaintiff's intestate.

PLEADINGS.

Paragraph II of complaint, page 3, states one of the purposes for which the defendant below was organized, viz: to operate a railroad. What kind of a railroad was intended is not stated.

Paragraph III states that defendant (below) is operating a railroad beginning at a point at or near the Albion River, and then running through or near T. 16 N., R. 16 W., for about 13 miles.

"That said defendant, during all of the times herein "mentioned, was engaged in managing and operating "said railroad, its roadbed, tracks, cars, locomotives, "appurtenances and appliances belonging to said road, "for the purpose of carrying passengers and moving "freight on and over said roadbed." (Page 4.)

This allegation shows that plaintiff below claimed the defendant to be a common carrier of passengers and freight. The defendant denied this statement; page 12 and page 16 sets out what kind of a railroad it operates, viz: A road to transport its own logs from the place where cut on its lands to its mill on the Albion River, and that it carries neither passengers nor freight.

That the road is about eight miles long; that it is equipped for carrying its own logs and lumber, and for no other purpose; that it runs entirely on its own land, and has never been operated for the carriage of passengers or freight.

On the trial it was not disputed but that the facts as set out in the answer were correct. No attempt was made to sustain the allegations of the complaint in that regard.

Paragraph IV of the complaint alleges failure on the part of the defendant below to comply with the statute of California, requiring railroads to keep their tracks fenced. This allegation was denied by the answer; and, as was the case in regard to the allegations in Paragraph III, the plaintiff made no attempt to prove it.

Paragraph V sets out, from the plaintiff's point of view, the facts of the accident. These facts, as stated in the complaint, are, in short, that on June 13th, 1893, the plaintiff's intestate "was received by said "defendant *as a passenger* aboard of one of the trains "of cars of said defendant, at or near the terminus "of said railroad in the redwoods in said Men-

" docino County, to be by said defendant carried and " transported over its said railroad to its terminus, at " or near Albion River." That. " after he had been " received aboard said train of cars," the defendant started to transport him ' as a passenger "; that the employees in charge of the train of cars were careless, heedless, reckless, and incompetent to manage or run the same, which fact was known to the defendant; that while the plaintiff was being transported as aforesaid, the train was " carelessly and negligently run and man- " aged," and " run at a dangerous and reckless rate of " speed," to wit: at a rate of speed of more than thirty miles an hour, and " while said cars were being run over " and along said railroad as aforesaid, with the said Jose " De Nobra as a passenger thereon, said cars were thrown " with great violence from the track of said railroad, " bruising and wounding said Jose De Nobra, and in- " stantly killing him.

" That, by reason of the failure of said defendant to " erect and maintain a good and substantial fence on " each side of its said railroad as aforesaid, and by " reason of the failure of said defendant to employ " prudent, careful, and skillful employees, servants, and " agents, to manage and run its locomotives, cars, and " trains over its said railroad as aforesaid, and by reason " of the careless, heedless, reckless, and dangerous " manner in which said train of cars was run over and " along said railroad as aforesaid, said Jose De Nobra " was wounded, bruised, and killed."

All the foregoing allegations, (which constitute

the gravamen of the complaint,) except the death of De Nobra, were denied by the answer, which further sets up that De Nobra came to his death by his own fault.

It must at once be observed that the theory upon which the action is based, and the theory upon which it was tried, (so far as plaintiff is concerned), is that the defendant below was a common carrier of passengers, and subject to the liabilities imposed by law on such carriers. It must further be observed that if defendant below was not such a carrier, and that if the plaintiff's intestate got aboard a vehicle used by the defendant for its own purposes solely, there are no sufficient allegations of willful and malicious conduct on the part of defendant to make it liable.

If a farmer's hired man, about to start with a load of hay from the field to the barn, invites a friend, or a stranger, to ride on the load, reckless driving on the part of the hired man, or the fact that the road to the barn was unfenced, by reason of which the load was upset and the party hurt, is no reason why the farmer should be held liable. The servant was acting outside his employment, and it is a familiar principle that the master is liable for the misconduct of his servant only when the servant is acting within the scope of his employment. In the case put the hired man's employment was to haul the hay. He was not employed to transport persons. The case of *Hoar* v. *Maine, etc., R. R.*, 70 Me. 65, is directly in point, and the Court applies the principle to a case where the deceased was invited to

ride on a handcar and was killed through gross carelessness in handling of the train that ran into the handcar.

If any further authorities on so plain a proposition are needed, they will be furnished further on.

In this case the evidence was conflicting as to whether De Nobra was invited to ride on the cars or not. The Lumber Co. claims that he climbed up on top of a carload of logs solely of his own volition, and that even if he had been invited to ride on the cars, that was no invitation to ride on such a dangerous place as on the top of a carload of logs.

But coming back to the pleadings, it will be observed that the following material issues of fact are made by the allegations of the complaint, and the denials of the answer:

1st. Was the plaintiff in error engaged in the business of carrying freight and passengers?

2nd. Did the defendant in error fail to fence its railroad track, and if so, was the accident caused thereby?

3rd. Did the plaintiff in error receive De Nobra as a passenger on its train and undertake to transport him as a passenger to his place of destination?

4th. Were the employees of the "Albion Lumber Co.," in the management of its locomotives and cars, "careless, heedless, negligent, reckless and wholly unfit "and incompetent to manage or run said locomotives "and cars," and was such fact known to the plaintiff in error?

5th. Did the employees of the "Albion Lumber

Co." while De Nobra was being transported as a passenger on its train of cars, " carelessly and negligently run and manage" the locomotive and train of cars and run them at " a dangerous and reckless rate of speed ?"

6th. Was it by reason of the failure of the Lumber Co. " to fence each side of its railroad, and by reason " of the failure of said defendant to employ prudent, " careful and skillful employees, servants, and agents to " manage and run its locomotives, cars and trains over its " said railroad as aforesaid, and by reason of the care- " less, heedless, reckless and dangerous manner in which " said train of cars was run" that De Nobra was killed ?

These are the issues involved in this case, and none other.

The first four of the six, the record shows, must be answered in the negative. The reason is, that as to one, two and four there was no evidence offered in support of the contention on the part of the plaintiff below, and as to No. 3, the facts proven show that De Nobra was not received as a passenger, and the Court below so instructed the jury. (See page 66.)

It is true that the court instructed the jury that, if they found that the defendant below permitted De Nobra to ride on the train, he was lawfully there, but that "he " was not a passenger as the word is understood in re- " gard to railroads."

But the learned Judge, as we shall presently show, mistook the law, for the reason that any permission attempted to be proved given by the servants of the de-

fendant to the plaintiff's intestate to ride on the logging train, was outside of the scope of their employment, and therefore the defendant below owed no duty whatever to the deceased. If he was injured by the wrongful act of these servants, they alone are liable. In addition it was proven, and without contradiction, that the deceased was not seen on the train until just before the accident occurred.

In the illustration given before of the farmer's hired man driving a load of hay to the farm, the friend whom he invited to climb up on the load with him, may or may not be considered as being lawfully there. The question is immaterial, so far as the owner is concerned. If the driver recklessly upsets the wagon and his friend is hurt, it is clear that the farmer is not liable, though as to the driver the friend was lawfully on the load.

Returning to the issues made by the pleadings, and assuming that the issues numbered above as 1, 2 and 4 must be answered in the negative for the reason that there was no attempt to prove the allegations of the complaint, and as to issue numbered 3 above, the Court instructed the jury that the deceased was not a passenger on defendant's train, nor received as such, nor did the defendant undertake to transport him as a passenger, and that such instruction was supported by the evidence, then we respectfully submit that plaintiff's cause of action, as stated in the complaint, falls to the ground. In other words, in order to maintain the action, the allegations numbered 1–2–3 and 4 in this analysis must be supported by evidence, or else allega-

tions 5 and 6 become meaningless, and do not of themselves state a case entitling the plaintiff below to relief.

Woodruff v. *N. R. R.*, 47 Fed. 689;
Hoar v. *Maine Central R. R.*, 70 Maine, 65.

Both the above cases went off on the sufficiency of the allegations attempting to hold the railroad liable.

In order to support the judgment of the court below this Court must hold that, though defendant was not a carrier of passengers, and ran its logging train solely for its own convenience on its own land, and employed careful and skillful employees, yet as the deceased was on the train (presumably for his own convenience), and the defendant's servants ran the train at a reckless and dangerous rate of speed, "and by reason of the "careless, heedless, reckless and dangerous manner "in which said train of cars was run over and along "said railroad the said Jose De Nobra was wounded, "bruised and killed," the defendant below is liable.

We respectfully ask what principle of law or morals makes the defendant below under such circumstances liable? The burden is on the plaintiff below, defendant in error, to point out this legal principle. We respectfully submit that it cannot be done to the satisfaction of the trained judicial mind.

Furthermore, another issue made by the pleadings was eliminated at the trial by the failure of the plaintiff below to offer any evidence in support of her allegation that the train was run at a dangerous rate of speed. The only evidence offered by the plaintiff was that the

train was run at the rate of thirty miles an hour. Whether or not that was a dangerous rate, nowhere appears in the record, except in the charge of the Judge to the jury, unless it be in the cross-examination of one of defendant's witnesses, to which we will refer further on.

FACTS.

Keeping in mind that only allegations numbered 5 and 6 in this analysis are really in issue on this appeal, we will now make a short statement of the facts. Wherever there is any conflict of testimony it will be noted.

The defendant below is a lumber company, and as such maintains a logging railroad solely for its own purposes. The general manager is Miles Standish (p. 38). Henry B. Hickey had charge of the logging road and the camps, but had no authority to invite or permit people to ride on the cars (pages 25–27–39–40). He employed the men in the woods (p. 41). The deceased applied to him for work June 13th, 1892. What took place as between the two men when this application was made is disputed. The plaintiff's witness Vieria, (p. 25,) who understands English very imperfectly, testified that when deceased, himself, and three or four others, asked for work, Hickey inquired if they had blankets, and being told that deceased and another had blankets at the Big River Hotel (several miles away) he said to them, "Get on the cars and go down boom and go and "get blankets and come up next day and start in to "work." Mr. Hickey, after having been called as a

witness by the plaintiff below, (p. 27,) thereby vouching for his character for truthfulness, (Greenleaf on Ev., 431–469; Chamberlayne's Best on Ev., 600,) was called by the defendant, and testified (p. 46): "Do not "remember the two men that were killed coming to me "and asking for work; we were pretty near through "with considerable work, and we would be letting men "out in a short while. We were hiring them all the "while. I never made any statement to anybody that "they should ride on those cars; never told anybody "to get on those cars, because I did not think it safe. "It is not rulable. I have no authority to permit it. "It is not safe, because the logs are liable to roll off. "If the statement is made that I told those men to get "on the train, it must be false, because I never told "anybody to get on the train. I have had 20 years' "experience with logging-trains, and, in my opinion, "it is not safe for a man to ride on a car loaded with "logs. It is not possible to so fasten the logs as to "prevent all danger of their getting loose and rolling "off. Motion of the car would make it impossible. It "would not be practicable. I would consider most any "place there unsafe for a practicable man. The rear of "the train is considered the safest place of a logging-"train—the rear cars."

The statement above of the witness Vieria is all the testimony offered by plaintiff to show invitation or authority for deceased to get on cars.

Deceased and another, by the name of Correia, went to the cook-house and got something to eat, and about

five or half-past five in the evening got on the train. (p. 26.) It was a long train, of thirteen cars, loaded with logs, and drawn by a locomotive. These logging-cars each consist of two platforms, with movable couplings connecting them; that is to say, by the use of the couplings the platforms can be so adjusted, as to their distance apart, that logs of any length can be carried, each end of the log resting on its own platform. Each platform is about eight feet square, and the logs are so loaded that there is room on the platform at the ends of the logs for car-brakes and a man to stand and work them. (Pages 29, 43, 44, 45.)

The deceased and Correia, instead of getting on one of the platforms, climbed up on top of the fourth car from the engine. (pp. 26, 30, 55.) The plaintiff's witness Vieria says (p. 27): "There was a pretty good "load on the cars—small and big logs—a big pile; piled "upon top of one another." One of defendant's brakemen, Pettit, also climbed up on same load of logs, and he, too, was killed.

It is impossible to fasten the logs so as to prevent their rolling, and, in consequence, the place selected by the deceased to ride was a very dangerous one, (pp. 39, 42, 43, 44, 45, 47,) and more dangerous than on the platform. The deceased and the others on this car were not seen until the train had pulled out from the water-tank, where they got on. The engineer did not see them at all (p. 61). The only other employees of defendant who could have seen them were the brakeman, who was killed with them, and Cortez, the other

brakeman. Cortez saw them after the train started. (pp. 55, 56.)

The train ran slowly for 1600 or 1700 feet to the top of a grade in a "rock-cut." (pp. 61, 58, 56.) It is 1950 feet from the tank to the west end of the cut. (pp. 46–56.) Plaintiff's only witness respecting the speed of the train and accident — a man by the name of Briggs — testified that the train ran at the rate of eight or ten miles an hour for the first half mile, say 2600 feet, and then checked up for the cut. (pp. 33–35.)

At this point comes the second instance in this record of conflict of testimony.

The first was as to Hickey telling the men to get on the cars, and now we find that this man Briggs, who was also stealing a ride, but it was on the platform instead of on top of the logs, testifies that at the cut the train increased its speed, and ran "like the wind" (and, in his opinion, at the rate of thirty miles an hour at the time of the accident), for a mile and a half (two or three miles from the tank), when he "felt a sudden jerk like a chunk," saw a log bounding up from the ground, and discovered the car was off the track. (pp. 33, 34.) "I either felt or saw it at least three times—chunk—" just like the end of a log would slip off the front part of the wagon or truck and it struck something solid." (p. 34.) Notwithstanding the train was going like the wind, on a down grade, "steep grade," the witness calls it, (p. 58,) or "heavy grade," (p. 63,) with thirteen cars heavily loaded with logs, the train stopped, the engine

and six and a half cars remaining on the track, the cars in front of those derailed, according to Briggs himself, only going 150 or 200 yards. As a matter of fact, by actual measurement, the cars with the engine only ran 150 feet before stopping. (pp. 46, 49, 62.) Instead of running like the wind for a mile and a half, the train from the cut ran less than half a mile, or about 2000 feet, by actual measurement. (pp. 46–56–57.)

The testimony of all the other persons on the train was taken in behalf of the defendant below as to the speed at which the train was running. Every other person on the train testified that the train was running slowly. The evidence was overwhelming on that point.

But there is one circumstance that shows beyond a shadow of a doubt that the testimony of the witness Briggs was willfully false as to the speed of the train, and that is the fact that, if the train had not been running slowly, the loaded cars in the rear would not have retained their places on the track when the cars of the middle of the train were derailed.

It was a down grade; no steam was being applied. The train was running at this alleged great rate solely by gravity; the train was a long and heavy one; there was only one brakeman; the train came to a sudden halt by the derailment of one car, and of the eight or ten cars behind it, only three others left the track. If plaintiff's story of the speed of the train were true, those rear cars would have piled up in one great heap on the derailed cars.

We do not forget the rule of presumption in favor of the verdict of a jury where there is any testimony to support it, but that rule does not require the Court of Appeals to shut its eyes to the effect of natural laws, and compel it to affirm a verdict based on the testimony of one witness as against that of five, when the testimony of that one witness is clearly in conflict with natural, physical law. To permit a verdict to stand under such circumstances would be a travesty upon justice and upon judicial proceedings.

We again repeat that we have called attention to the only items involving conflict of testimony, viz.: the conflict between plaintiff's witness Vieria and defendant's witness Hickey, as to the latter directing or not directing the deceased to get on the train. And the conflict between the plaintiff's witness Briggs on the one hand, and the law of gravitation and the testimony of every other person on the train on the other hand, as to the rate of speed at which the train was running; and between the witness Briggs, on the one hand, as to distance run, and actual measurements on the other.

All the other facts of this case are undisputed.

But it will be observed that nothing has been said as yet as to what caused the accident. Plaintiff below contented herself on that question by submitting the testimony of Briggs that the train was running at a speed of about thirty miles an hour. She offered not one word of testimony as to what caused the car on which her intestate was seated to separate, and part leave the track. She did not even elicit an opinion from her only witness

on the subject that the accident was caused by the speed at which the train was run.

But worse still, she did not prove, or offer to prove, or attempt to prove, that running the train at the rate of thirty miles an hour was a dangerous rate of speed, or that it was careless so to do.

There was nothing whatever to base the charge of the court, found at page 86, upon, unless it be found in the cross-examination of the fireman who had testified for defendant. (p. 59.)

The plaintiff had closed her case, the witness (defendant's fireman) was called, and testified to the rate at which the train was run; and it was not till his cross-examination that anything was said about what would be a dangerous rate of speed. That he was qualified to give an opinion does not appear, but he says he supposes that thirty or forty miles per hour would be dangerously fast. He also says that the train was running at no such rate. If his statement of what is only a matter of opinion on his part is to be taken as evidence, surely his positive statement of a fact should not be disregarded.

How did the jury know, or how can this Court know, that running a logging-train at the rate of thirty miles an hour is dangerous? Without any evidence on the subject whatever, except that of defendant, that the railroad was a good one, with good ballast and steel rails (p. 60), and the cross-examination above referred to, the court below left it to the jury to find the fact necessary to make out plaintiff's case, viz: that running this train at the rate of thirty miles an hour, on this well-ballasted

road, with steel rails and good track, was a reckless rate, and was the cause of this accident. Running a train at the rate of three miles an hour, or running the train at all, might be the cause of the accident. It will be observed that the court leaves it to the jury to decide what rate of speed, though it only be ten miles miles an hour, is dangerous. Where is the testimony to support this charge? Let the defendant in error point it out.

The plaintiff below left the question as to the cause of the accident wholly in the dark. The defendant below could well afford to let the matter rest right there, and did so. It contented itself with meeting the plaintiff's case as made out, and showing beyond a doubt the true rate at which the train ran, the character of the road, etc., etc. The defendant met the case as presented. It was not called upon to raise the question of what did in truth and in fact cause the accident until a case had been made out against it by plaintiff.

But, on cross-examination of defendant's witnesses, the plaintiff brought out the true cause of the accident, viz: that a bull came up from under a bridge, got between the train and a steep bank, the locomotive and two cars passed him, then, as he attempted to turn, no doubt, a car struck him, ran over him, and part of the train, including the hind half of the car the deceased was on, was derailed, and the unfortunate death of three human beings followed. (pp. 57–60.)

That is all there is to this case. The plaintiff did not prove that thirty miles an hour was an unsafe rate of speed, nor what caused the accident.

The defendant met the case as presented, and cross-examination of defendant's witnesses draws out the fact that the accident was caused, as thousands of others have been, by running into an animal that got on the track.

No attempt was made on rebuttal, or by cross-examination, to show that the accident was caused by any fault of the defendant, or that running over the bull was not the true cause.

Ought not the court below to have instructed the jury to find for the defendant?

We are so satisfied that the mere statement of the case is sufficient to show that this action cannot be maintained as against the defendant below that we shall not dwell at any length upon the error of the court in giving its instructions. The foregoing statement of facts shows that the court below mistook the case and the law completely.

RESPONSIBILITY OF DEFENDANT FOR THE ACTS OF ITS SERVANTS.

If it had been proved that running the train at the rate of thirty miles an hour was a reckless and dangerous rate of speed, that the train was run at that rate, and that the accident was caused thereby, and it had not been shown that the accident was caused by a bull getting on the track, and if the statement of the witness Vieria, of what took place between himself and Mr. Hickey, was admitted to be true, still no case is made out, under the authorities, against the defendant, for the reason that the defendant's servants in undertaking to carry the plaintiff's

intestate on board their logging train, were acting beyond the scope of their authority or duties. They were not employed to carry people, but to haul logs. We believe all the authorities are agreed upon that proposition, and shall call attention to a few of them that seem most pertinent.

In the light of those authorities the charge of the court, found at p. 72, was incorrect and misled the jury.

Duff v. *2 V. R. Co.*, 91 Pa. State, 458.

In this case, by connivance of the conductor and other train men, a boy was permitted to ride upon the train in order to sell newspapers to the passengers. He was hurt through carelessness on the part of the railroad employees, and brought suit to recover damages against the company. The court instructed the jury:

"If this boy was on the train as a trespasser, without "authority from any one having the power to give it, "plaintiff cannot recover damages except for intentional "injury or very gross negligence, and then probably not "from the company, but from the person causing the "damage."

In regard to the authority of the conductor to invite the boy on the train the court instructed the jury:

"That permitting a man to ride, or inviting him on "to the engine by the conductor or engineer, is out of the "usual course of the company's employment, and if the "person so invited is injured through carelessness, the "company is not responsible. If he was there by the "invitation of the fireman, permitted by the conductor,

" for the purpose simply of pursuing his own employment, " without the authorization of the company's superior " officers, then he was an intruder and a trespasser upon " the train, and the company come under no obligation to " him, and his mother cannot recover in this action. The " reason recoveries are allowed to be had against corpora- " tions is because they owe a duty to the passenger for the " consideration of fare paid, and in the absence of fare paid, " or invitation by a superior officer, to wit: a free pass, " the company has neither expressly or impliedly agreed " to carry such person safely."

The case of *Hoar* v. *Maine, etc., R. R.*, 70 Maine, 65, is a stronger authority in favor of our contention.

The attention of the Court is specially called to the Canada case there quoted.

The case of *Morris* v. *Brown*, 111 N. Y. 318, is almost precisely analogous to the case at bar, for the reason that the defendant in that action, like the defendant here, was using a train of cars solely for his own purposes. The court there held that the defendant owed no duty to the plaintiff intestate, and that no license for him to be upon the train could be implied by his habit of riding thereon, and that decedent took upon himself the risk, both as to the condition of the cars, and the quality and care of the brakemen.

The case of *Eaton* v. *Delaware L. & W. R. R. Co.*, 57 N. Y. 382, is peculiarly apropos to the discussion here. The court held:

" The presumption is that a stranger riding upon a

" freight train is not legally a passenger, and is not law-
" fully upon the train, and no liability for negligence can
" be imposed upon the company as to him, unless the spe-
" cial circumstances of the case rebut that presumption.
" Plaintiff was invited by the conductor of a coal train
" upon defendant's road, to ride upon the train, with a
" promise to get him employment as a brakeman. No
" passenger car was attached to the train, but, aside from
" the coal car, simply a caboose for the carriage of train
" implements and the accommodation of defendant's em-
" ployees, in which the plaintiff was invited to, and did
" ride. Through the negligence of defendant's employ-
" ees, the train was run into by another, and plaintiff in-
" jured."

The court in that case said:

" *The solution of the question at issue is not to be sought*
" *in the rules of law appertaining to common carriers. It*
" *must he obtained from the principles of the law of agency.*
" The true inquiry is, whether the conductor, as an agent
" of the defendant, had the power to take the plaintiff
" upon the train in such way as to bind the defendant
" as a carrier, to him, as a passenger."

From the statement of facts made by the court it appears that the accident was caused by the gross negligence of the defendant's servants, and without fault on the part of the plaintiff. The court discusses the facts and the law at very considerable length, holding that the defendant was not liable. Especial attention of the Court is called to the principles discussed in that decision.

Wilson v. *New York Sleeping Car Co.*, 139 Mass. 556. This case is frequently cited.

Stone v. *Hills*, 45 Connecticut, 45.

This case contains a long review of the English and American authorities upon the subject of the master's liability for the torts of his servants.

Keating v. *Michigan Central R. R. Co.*, 56 Northwestern Reporter, 346 ;

Pelton v. *Schmidt*, 56 Northwestern Reporter, 689 ;

Lochat v. *Lutz*, 22 Southwestern Reporter, 218 ;

Stephenson v. *Southern Pacific R. R. Co.*, 93 Cal. 558.

The above case was a much stronger case for holding the defendant liable than the one at bar, and the attention of the Court is called to the discussion by Justice De Haven.

Rhodes v. *N. Y. Central R. R. Co.*, 28 N. Y. S. 691 ;

Smith v. *N. Y. Cent. R. R. Co.*, 29 N. Y. S., 540 ;

Beiderman v. *Brown*, 49 Ill. App. 483 ;

C. R. & P. Co. v. *Kochler*, 47 Ill. App. 147 ;

Railway Co. v. *Anderson*, 92 Texas, 519 ; 17 S. W. Rep. 1039 ;

Texas & P. R. R. Co. v. *Moody*, 23 S. W. Rep. 41 ;

Texas & P. R. R. v. *Black*, 27 S. W. Rep. 118 ;

L. O. & T. R. R. Co. v. *Douglas*, 69 Miss. 723 ;

Short v. *Minor*, 13 S. E. Rep. 702 ;

Bess v. *Chesapeake & C. R. R. Co.*, 35 W. Va. 492 ; 14 S. E. 234 ;

Baltimore, etc., R. R. Co. v. *Wilkinson*, 30 Md. 224;

Dougan v. *Champlain T. Co.*, 6 Lans. 430;

Robertson v. *N. Y. & Erie R. R. Co.*, 22 Barb. 91;

Doggett v. *Ill. C. R. R. Co.*, 34 Iowa, 244;

Quinn v. *Ill. C. R. R. Co.*, 51 Ill. 495;

Ward v. *Central Park R. R.*, 11 Abb. (N. S.), 411;

Fleming v. *Brooklyn City, etc. R. R.*, 1 Abb. (N. C.), 433;

Mitchell v. *N. Y. & Erie R. R. Co.*, 146 U. S. 513.

In *Virginia etc. R. R.* v. *Roach*, 83 Va. 375, was where the engineer invited the plaintiff to ride upon the engine. The invitation was accepted, and the plaintiff hurt by the carelessness of the employees of the defendant. The court held, following the Pennsylvania case above cited, that the action could not be maintained.

Little Miami R. R. Co. v. *Wetmore*, 19 Ohio S. 110, 2nd A. M. R. 373, seems to be a leading case upon the question as to whether or not a servant is acting within the scope of his authority when he commits an unwarrantable assault upon a third person. The head-note to this case is as follows:

"The plaintiff, a passenger on the defendant's road, "applied to the baggagemaster to have his trunk "checked, which not being promptly done, the plain- "tiff became angry, and used threatening and abusive

" language, whereupon the baggagemaster seized a hatchet " and struck him." Held, that the company was not liable.

The court says (p. 131): " To make the master re- " sponsible, the act of the servant must be done in the " course of his employment ; that is, under the express or " implied authority of the master. Beyond the scope of " his employment the servant is as much a stranger to his " master as any third person, and the act of his ser- " vant not done in the execution of his service for which " he was engaged cannot be regarded as the act of the " master. That there was in this case no express author- " ity given to the servant is conceded. Can such authority " be implied under the circumstances of the case from the " nature of the business intrusted to his charge." The court held that it cannot. In commenting upon the charge to the jury in this case, the court say: " A charge " though not strictly objectionable in point of law, but " which leaves the jury to draw an incorrect inference " from the facts in the case material to the issue, will " constitute good ground for a new trial, where it is " reasonable to suppose from a consideration of the whole " evidence that a different verdict would have been ren- " dered if the jury had been fully instructed. The charge " ought not only to be correct but to be so adapted to the " case and so explicit as not to be misconstrued or mis- " understood by the jury in the application of the law to " the facts as they may find them from the evidence." (Citing 18 Me. 436; 30 Conn. 343.)

Alabama etc. R. R. Co. v. *Harris*, 14 Southern Reporter, 263: " A railroad company is not liable to a tres-

passer on its trains for personal injuries caused by the willful and malicious conduct of its servants, unless the act complained of was done in the discharge of the servant's duty and within the line of his employment."

A very instructive case is that of *Walker* v. *Hannibal etc. R. R. Co.*, 26 Southwestern Reporter, 360. The discussion of the principles applicable to this case are so long that we ask the Court to examine it without our reporting it here. It contains a review of a number of authorities upon the questions involved.

See also the following cases :

Files v. *Boston & A. R. R.*, 149 Mass. 206.

An open hole in the earth, which is not concealed otherwise than by the darkness of the night, is a danger which a mere licensee going upon the land must avoid at his peril. (Cases cited.)

Rearden v. *Thompson*, 149 Mass. 267.

"Conceding that the respondent was not wrongfully "in the place where the accident occurred, and giving "the most liberal construction to his evidence, he was "there by the mere license of the appellant, and for that "reason the appellant owed him no duty, and he went "there subject to all the risks attending his going."

Schmidt v. *Bauer*, 80 Cal. at p. 569.

"In order to maintain an action for an injury to person "or property by reason of negligence, or want of due care, "there must be shown to exist some obligation or duty "towards the plaintiff which the defendant has left undis-"charged or unfulfilled."

Ibid, at p. 568, quoting the leading case of *Sweeny* v. *Old Colony etc. R. R.*, 10 Allen, 372.

The Sweeny case is quoted over and over again in the decisions:

"What we say is, that the company does not owe to a "mere trespasser upon its tracks the duty of doing acts "to facilitate his trespass or render it safe. In other "words, it is not bound to provide any particular kind of "machinery or appliances for his benefit, or (when not "aware of his presence), to give cautionary signals to "notify him of the approach of its trains. And we do "not put this upon the ground of contributory negligence, "which would imply that the defendant, as well as the de-"ceased, was guilty of negligence in a legal sense. We "put it upon the ground that the defendant owed no duty "to the deceased to do the acts whose omission is com-"plained of."

Tormey v. *S. P. Co.*, 86 Cal., at p. 380.

"If a person takes an exposed position upon a train "not designed for the use of passengers, he himself incurs "the special risks of that position, whether he takes it by "license, non-interference or even express permission of "the conductor. (*Hickey* v. *Boston & Lowell R. R.*, 14 "Allen, 429; *Bates* v. *Old Colony R. R.*, 147 Mass. 255; "*Torrey* v. *Boston & Albany R. R.*, 147 Mass. 412.)

"In the case at bar, the conductor had no general au-"thority, so far as shown, to take passengers on the loco-"motive engine, or any special authority to take the "plaintiff. The conductor was not only in charge of a

" freight train, but on a road intended solely for the trans-
" portation of freight. The locomotive engine was obvi-
" ously not intended for passengers, and he had in his
" charge no vehicle in any way adapted for passengers.
" In riding for his own convenience in a place where it
" was not safe or prudent to ride, the plaintiff took upon
" himself the risk of so doing, whether he did so on the
" license or invitation of the conductor. It was not within
" the apparent scope of the freight conductor's authority
" to prevent persons to ride on his freight train, far less
" on the locomotive engine thereof; nor can the fact that
" he had allowed the plaintiff to do so at a previous time,
" and also that the local freight agent and a conductor
" were known to the plaintiff to have ridden on the loco-
" motive engine, make the defendant responsible for acci-
" dents which occurred thereby."

Merrill v. *Eastern R. R.*, 139 Mass. 238.

CONTRIBUTORY NEGLIGENCE.

That the plaintiff's intestate was guilty of contributory negligence in getting upon so dangerous a place as the top of a pile of logs on a car, goes without saying. The rules applicable to such cases are so familiar that it is not worth while to enter into a discussion of them. The cases already cited fully support our contention that the defendant is not liable because of the folly of deceased taking such an exposed position as he did.

Where the negligence of the plaintiff contributes directly and proximately to the injury, there can be no recovery, notwithstanding the negligence of the defendant,

if the defendant's negligence is not willful or wanton.

Esprey v. *S. P. R. R. Co.*, 86 Cal. 399.

The fact that the company had permitted other people to ride upon its trains does not change the relationship of the deceased De Nobra to the defendant.

Sears v. *Eastern R. R. Co.*, 96 Mass. 433;
Railroad Co. v. *Jones*, 95 U. S. 440;
Mitchell v. *Railway*, 146 U. S. 513;
Glass v. *Memphis R. R. Co.*, 94 Ala. 581;
Central R. R. Co. v. *Brimson*, 70 Ga. 207;
Memphis R. R. Co. v. *Wamock*, 84 Ala. 149;
Warden v. *Louisville R. R. Co.*, 94 Ala. 277;
Southern Kansas R. R. Co. v. *Robbins*, 43 Kans. 145;
Schurhold v. *N. B. & M. R. R. Co.*, 40 Cal. 447;
Ferguson v. *Central Iowa R. R. Co.*, 58 Iowa, 293.

DEFENDANT'S INSTRUCTIONS REFUSED BY THE COURT.

This brief is already so long that we cannot dwell at length upon the refusal of the court to give the instructions asked for by the defendant below.

That those instructions ought to have been given fully appears from the cases already cited in support of our contention, that the instructions actually given were erroneous and misleading.

The instructions asked and refused were the opposite of those given.

We claim the defendant was right in its theory of the

law, applicable to the case in hand, and the Court was wrong; and in support of our views refer to the cases already cited.

CONCLUSION.

If we are right in our contention that upon the merits the defendant is not liable, we respectfully ask this Court to so declare. Another case is depending upon this.

This case, we submit, must be reversed in any event and a new trial ordered; but to order a new trial without settling the law of the case will work a hardship to all parties, and will result, in all probability, in another appeal from any new judgment that may be entered.

We respectfully ask that the judgment of the court below be reversed and a new trial ordered; and that this Court settle the law, so far as it can be done, which shall guide the court and the litigants when that new trial takes place.

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